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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 504

EASTERN AIR TRANSPORT, INC., COMPLAINANT, APPELLANT,

v.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

REPLY BRIEF ON BEHALF OF APPELLANT.

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With the exception of two cases, all of the authorities cited in the brief of appellees fall into one of two classes:

Taxes on property.

Taxes on mining, or manufacturing.

Property Taxes.

The South Carolina gas tax here involved is not a property tax. This we think will be conceded. Nevertheless, we point to the allegation of the petition, paragraph 18, page 8 of the record, which alleges that the tax is not a property tax, the answer of the respondent at page 21 of the record, which admits that it is not a property tax; the opinion of the Court of Appeals of South Carolina in *Gregg Dyeing Co.* v. *Tax Commissioner*, which holds that it is not a property tax (see page 7, appellant's main brief), which opinion is entitled to very careful consideration from this Court (*Games* v. *Stiles*, 14 Pet. 322, 328, *McGregor* v. *Hogan*, 263 U. S. 234), and to the fact that the tax itself has not the slightest resemblance to a property tax. For example: it is not assessed; it bears no relation whatever to the value of the property concerned; the property would remain indefinitely in the hands of its owner or possessor, without tax, unless and until sold or used.

The fact that the State of South Carolina might impose a property tax on this gasoline, which would result in no greater burden upon interstate commerce than the present tax, is of course beside the mark. It is conceded that the State of South Carolina can impose a tax upon property, even though such property be used in interstate commerce. It could, for example, impose a tax on appellant's airplanes used only in interstate commerce, provided they had a situs for purposes of taxation within the State of South Carolina. *Old Dominion Steamship Co.* v. *State of Virginia*, 198 U. S. 299. But, this Court has held that such a

tax *must be a property tax. Adams Express Co.* v. *Ohio,* 165 U. S. 194. We are not concerned with some other kind of tax which South Carolina might impose which would be constitutional—we are concerned only with what South Carolina seeks to do through the medium of the tax now under consideration.

The essential distinction between a property tax and an excise tax, such as the one here involved, is that in the former there is always a point where the tax ceases to be a tax and becomes confiscation. When that point is reached, the courts step in and grant relief. But, in the case of an excise tax of the character here involved, there is no such limit. If South Carolina can impose a tax of 6 cents per gallon upon a special type of gasoline intended for use in, and used only in, aircraft engaged in carrying passengers and United States mail in interstate commerce, it can impose a tax of 60 cents on the same gasoline. It takes no imagination to appreciate that the imposition of taxes of this character by each and every State in which this appellant might be compelled to refuel its planes would soon put an end to its interstate air transportation, and terminate its ability to carry out its contract to carry the United States mail, to say nothing of similar results in the even longer journey by air across the continent, from New York to Los Angeles. This Court long since recognized such a possibility, for said Justice Field in *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 205:

> "If such a tax can be levied at all, its amount will rest in the discretion of the State. It is idle to say that the interests of the State would pre-

> vent oppressive taxation. Those engaged in foreign and inter-State commerce are not bound to trust to its moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the State until the act of commerce, the transportation of passengers and freight, is completed."

Nor does the fact that the burden of this tax, or a tax of even greater burden, would fall upon the people of South Carolina and this appellant *equally*, give it any validity. This was pointed out by Mr. Justice Harlan in *Minnesota* v. *Barber*, 136 U. S. 313, 326:

> "To this we answer, that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."

Mining and Manufacturing Tax.

Mining and manufacturing are not commerce. That has been so often held by this Court that it seems needless to cite authorities. As to the mining and manufacturing cases, such as *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459, and the others of the same category, cited by the appellees, it would seem to be sufficient to merely quote the language of this Court in a case dealing with a *sales tax*, to wit: *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575, where Mr. Justice Van Devanter, speaking for a majority of the Court, said:

"The cases of Cornell v. Coyne, 192 U. S. 418, 48 L. Ed. 504, 24 S. Ct. 383, and American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522, cited by counsel for the Government, are not pertinent; for both related to taxes distinctly imposed on manufacturing."

See also *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, which involved a New York State *tax* upon the *sale* of goods manufactured and sold for export, where it was held that the State tax could not apply.

The two cases which do not fall within either category above pointed out are *first*, *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290. That case involved an Illinois law taxing foreign corporations doing business in the State, which tax was based upon the proportion of capital stock actually represented by property located, and business transacted, within the State, as provided by the State law. The tax was in the nature of a franchise tax, but in its essence was a property tax. The mere statement of the character of the tax involved is sufficient to differentiate it from the tax in this case.

Second. Central Transfer Co. v. *Commercial Oil Co.*, 45 Fed. (2d) 400, which is referred to in our main brief at page 30 as being the *single* case—with the exception of this appeal—wherein the United States District and Circuit Courts have failed to give to *Helson* v. *Kentucky*, 279 U. S. 245, the construction contended for by us. The Central Transfer Company case was "dismissed for want of jurisdiction" so that District Judge Faris' comments on the Helson case are really *obiter*, and not entitled to the consideration which should be

given to the opinions of Circuit Judges Cotterell and Phillips in *United States Airways* v. *Shaw*, 43 Fed. (2d) 148, and *Mid-Continent Air Express* v. *Lujan*, 47 Fed. (2d) 266, respectively.

Nature of the South Carolina Tax.

The tax in this case is clearly not a tax on property, nor is it a tax on mining or manufacturing. It is denominated a license tax in the statute itself, but it is in fact in the nature of a consumption tax. This, we submit, is obvious from the Act itself, which imposes a tax upon the gasoline when sold, consigned or *used*. Any question as to the nature of the tax would seem to be set at rest by the language of the Supreme Court of South Carolina in *Gregg Dyeing Co.* v. *Tax Commissioner*, which hold that the public policy of the State "is that all *consumers* shall pay the gallonage tax of six cents" (italics ours), which clearly makes it a tax on consumption or use, so that under the most restricted and limited construction which can be placed upon *Helson* v. *Kentucky, supra*, the South Carolina statute is void, at least as far as taxing gas bought by appellant for *use* in interstate commerce.

Here the consumer is a corporation regularly engaged in interstate commerce, which buys a type of gasoline intended for use in airplanes and which is not suitable for use in automobiles. In other words, it is an example of what Mr. Justice Holmes characterized in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, as "sales made with a view to a certain result", rather than "those made simply with indifferent knowledge that the buyer contemplates that result". In *Superior*

Oil Co. v. *Mississippi*, the Court's language rather suggests that had the sales there been made with a view to a certain result, as in this case, and had the facts indicated a "manifest certainty of the destination" of the gasoline as in this case, instead of a fictitious destination, the Court's conclusions would have been quite different. In this case, there not only exist "sales made with a view to a certain result", but those made with a "manifest certainty of the destination" of the article sold, to wit: its use in interstate commerce as a part of a regular organized scheme of business equal in character and dignity and importance to that passed upon by this Court in *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, and other cases referred to in our main brief.

Conclusion.

In *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 245, Mr. Justice McReynolds says:

> "Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."

Interstate air transportation is a new method of transporting mail and passengers, particularly in transcontinental journeys, but it does not require the imagination of a Jules Verne to visualize, based upon the progress of the last few years, what the future of air transportation in this country will be. The tremendous speed of aircraft at the present time, and an almost unlimited speed in the future, make it es-

sentially an instrument not only of interstate, but also of international commerce—a fact recognized by the control already assumed over it by the laws of Congress as well as by the various treaties of the world nations in convention assembled. It perhaps is no exaggeration to say that air transportation of the future, compared with that of today, is just about where steamboat transportation of today is, compared with its condition when this Court was called on to pass upon the monopoly granted by the State of New York to Robert Livingston and Robert Fulton for the exclusive navigation "of all the waters within the jurisdiction of that State, with boats moved by fire or steam." *Gibbons* v. *Ogden*, 9 Wheat. 1. One may well shudder to think of what maritime steam transportation in this country would be, had the Court sustained the contentions of Livingston and Fulton. The question of whether the State of South Carolina is to receive 6 cents on every gallon of gasoline purchased by this appellant for use in its interstate commerce sinks into insignificance, compared to the question of whether this new, great and growing means of commerce is to be throttled and burdened by the forty-eight states, in any one or more of which an airplane engaged in interstate commerce may stop to refuel. We think it no exaggeration to suggest that the problem now before this Court may, in years to come, prove to be as far-reaching as was the problem decided by Chief Justice Marshall in *Gibbons* v. *Ogden, supra.*

No one could possibly take issue with the language of this Court, expressed by Mr. Justice Holmes in *Superior Oil Co.* v. *Mississippi, supra,* at 395:

> "The importance of the commerce clause to the Union, of course, is very great. But it also is important to prevent that clause being used to deprive the states of their lifeblood by a strained interpretation of facts."

To sustain the appellant's contention in this case would not deprive the State of South Carolina of its "lifeblood", nor would it deprive States generally of the right to enact sales taxes. Such taxes would clearly not be a burden upon interstate commerce, except in rare and exceptional cases, that is to say, in a case like this one, where interstate commerce cannot be carried on without purchasing an instrumentality thereof, within the confines of a State, through which such commerce regularly passes; where there is a usual, customary and recognized course of interstate business, and where the State tax results in imposing an undue burden on that business—it would only be in cases of this sort where the State sales tax law would not be applicable, and even there, as to such interstate business only. We cannot, of course, attempt to define what is and what is not a burden upon interstate commerce, but we believe that based upon the decisions of this Court, the above suggestion is entirely proper. The State law would remain in full force and effect, except as to those cases where this or some other court of competent jurisdiction had held that it imposed a burden upon interstate commerce.

We respectfully point to the various cases cited in our main brief, which we believe sustain our contentions, and particularly such cases as the Grain cases, above referred to; *Panhandle Oil Co.* v. *State of Mis-*

sissippi, 277 U. S. 218; *Indian Motocycle Co., supra*, and last but by no means least, the decisions of the two Circuit Courts (both acquiesced in by the States of New Mexico and Oklahoma since no appeal in either case was taken), and the one District Court which have passed on almost this exact question, in the opinions in which cases they interpreted this Court's ruling in *Helson* v. *Kentucky, supra.*

We respectfully submit that the authorities cited by appellees—no one of which deals with a *sales* or *consumption* tax—are not pertinent to the issues in this appeal; that upon principle and authority the court below erred in failing to grant an interlocutory injunction; that as to appellant's interstate business the South Carolina law is repugnant to the Commerce Clause of the Constitution; and that appellant is entitled to such relief from this Court as will enable it to conduct its interstate passenger and mail aircraft flying business free from the burdens now imposed upon it by the State of South Carolina.

Respectfully submitted,

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Counsel for Appellant.